

CHAPTER 1

LEGAL BASES FOR USE OF FORCE

INTRODUCTION

There are a variety of internationally recognized legal bases for use of force in relations between States, found in both customary and conventional law. Generally speaking, the United Nations Charter provides the primary authority for use of force under the auspices of either Security Council sanctions (Chapter VII enforcement) or self defense pursuant to Article 51 (which recognizes the continuing legitimacy of acts of both individual and collective self defense).

Policy and Legal Considerations

Before committing U.S. military force abroad, decision-makers must make a number of fundamental policy determinations. They must be sensitive to the legal, political, diplomatic, and economic factors inherent in a decision to satisfy national objectives through the use of force. The legal underpinnings, both international and domestic, are the primary concern in this determination. Thus, any decision to employ force must rest upon both the existence of a viable legal basis in international law, as well as in domestic legal authority (including application of the 1973 War Powers Resolution (WPR)).

Though these issues will normally be resolved at the Cabinet level, it is nevertheless essential that judge advocates understand the basic concepts involved in a determination to use force. Using this mission statement provided by higher authority, the judge advocate must become familiar with the legal justification for the mission and, in coordination with higher headquarters, be prepared to brief all local commanders on the justification. This will enable commanders to better plan their missions, structure public statements, and conform their conduct to national policy. It will also assist commanders in drafting and understanding Rules of Engagement (ROE) for the mission, as one of the primary purposes of ROE is to ensure that any use of force is consistent with national security and policy objectives.

The judge advocate must also be mindful of the fact that the success of any military mission abroad will likely depend upon the degree of domestic support demonstrated during the initial deployment and sustained operation of U.S. forces. A clear, well-conceived, effective, and timely articulation of the legal basis for a particular mission will be essential to sustaining support at home and gaining acceptance abroad.

The General Prohibition Against the Use of Force

The UN Charter mandates that all member nations resolve their international disputes peacefully,¹ and requires that they refrain in their international relations from the threat or use of force.² An integral aspect of this proscription is the principle of nonintervention; that States must refrain from interference in the internal affairs of another. Stated another way, nonintervention stands for the proposition that States must respect one another's sovereignty. American policy statements have frequently affirmed this principle, and it has been made an integral part of U.S. law through the ratification of the Charters of the UN and the Organization of American States (OAS),³ as well as other multilateral international agreements which specifically incorporate nonintervention as a basis for mutual cooperation.

¹ UN Charter, Article 2(3): "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered." The UN Charter is reprinted in full in this Handbook.

² UN Charter, Article 2(4): "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . ."

³ OAS Charter, art. 18: "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements."

Inter-American Treaty of Reciprocal Assistance (Rio Treaty), art. I: ". . . Parties formally condemn war and undertake in their international relations not to resort to threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations or this Treaty."

THE LAWFUL USE OF FORCE

Despite the UN Charter's broad legal prohibitions against the use of force and other forms of intervention, specific exceptions exist that justify a State's recourse to the use of force or armed intervention. While States have made numerous claims, utilizing a wide variety of legal bases to justify a use of force, it is generally agreed that only two types of action legitimately fall within the ambit of international law: (1) actions sanctioned by the UN Security Council under Chapter VII of the UN Charter, and (2) actions that constitute a legitimate act of individual or collective self defense pursuant to Article 51 of the UN Charter and/or customary international law.

UN Enforcement Actions (Chapter VII)

Chapter VII of the UN Charter, entitled "Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression," gives the Security Council authority to determine what measures should be employed to address acts of aggression or other threats to international peace and security. The Security Council must first, in accordance with Article 39, determine the existence of a threat to the peace, breach of the peace, or act of aggression. It then has the power under Article 41 to employ measures short of force, including a wide variety of diplomatic and economic sanctions against the delinquent State, to compel compliance with its decisions. Should those measures be inadequate, the Security Council has the power to authorize member States to employ military force in accordance with Article 42. Using this authority over the past decade, the Security Council has taken the following actions to restore peace and security:

-- Security Council Resolution 678 authorized member States cooperating with the Government of Kuwait to use "all necessary means" to enforce previous resolutions. It was passed in response to the Iraqi invasion of Kuwait, pursuant to the Security Council's authority under Chapter VII.

-- Security Council Resolution 794 authorized member States to use "all necessary means to establish, as soon as possible, a secure environment for humanitarian relief operations in Somalia."

-- Security Council Resolution 940 authorized member States "to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement"

-- Security Council Resolution 1031 authorized the member States "acting through or in cooperation with the organization [NATO] referred to in Annex 1-A of the Peace Agreement [Dayton Accords] to establish a multinational implementation force (IFOR) under unified command and control [NATO] in order to fulfill the role specified in Annex 1-A and Annex 2 of the Peace Agreement; Authorizes the Member States . . . to take all necessary measures to effect the implementation of and to ensure compliance with Annex 1-A of the Peace Agreement"

--Security Council Resolution 1386 authorized the establishment of an International Security Assistance Force (ISAF) to assist the Afghan Interim Authority. Additionally, this Resolution authorized member states participating in the ISAF to "take all necessary measures to fulfill its mandate."

Regional Organization Enforcement Actions

Chapter VIII of the UN Charter recognizes the existence of regional arrangements among States that deal with such matters relating to the maintenance of international peace and security as are appropriate for regional actions (Article 52). Regional organizations, such as the Organization of American States, the Organization of African Unity, and the Arab League, attempt to resolve regional disputes peacefully, prior to the issue being referred to the UN Security Council. Regional organizations do not, however, have the ability to authorize, on their own, the use of force (Article 53). Rather, the Security Council may utilize the regional organization to carry out Security Council enforcement actions.

SELF DEFENSE

The inherent right of all nations to defend themselves was well-established in customary international law prior to adoption of the UN Charter. Article 51 of the Charter provides:

“Nothing in the present Chapter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a member of the UN until the Security Council has taken measures necessary to maintain international peace and security. . . .”

The questions that inevitably arises in conjunction with the “codified” right of self defense involve the scope of authority found therein. Does this right, as is suggested by the language of Article 51, exist only when a State is responding to an actual “armed attack,” and then only until the Security Council takes effective action? In other words, has the customary right of self defense been limited in some manner by adoption of the Charter, thus eliminating the customary concept of *anticipatory self defense* (see below) and extinguishing a State’s authority to act independent of the Security Council in the exercise of self defense?

Those in the international community who advocate a restrictive approach in the interpretation of the Charter, and in the exercise of self defense, argue that reliance upon customary concepts of self defense, to include anticipatory self defense, is inconsistent with the clear language of Article 51 and counterproductive to the UN goal of peaceful resolution of disputes and protection of international order.

In contrast, the majority of States, including the U.S., argue that an expansive interpretation of the Charter is more appropriate, contending that the customary law right of self defense (including anticipatory self defense) is an inherent right of a sovereign State that was not “negotiated” away under the Charter. Arguing that contemporary experience has demonstrated the inability of the Security Council to deal effectively with acts and threats of aggression, these States argue that rather than artificially limiting a State’s right of self defense, it is better to conform to historically accepted criteria for the lawful use of force, including circumstances which exist outside the “four corners” of the Charter.

Customary International Law and the UN Charter

It is well accepted that the UN Charter provides the essential framework of authority for use of force, effectively defining the foundations for a modern *jus ad bellum*. Inherent in its principles are the requirements for both **necessity** (the exhaustion or ineffectiveness of peaceful means of resolution; the nature of coercion applied by the aggressor State; objectives of each party; and the likelihood of effective community intervention) and **proportionality** (limitation of force to the magnitude, scope and duration to that which is reasonably necessary to counter a threat or attack), as well as an element of timeliness (i.e., delay of a response to attack or threat of attack attenuates the immediacy of the threat and the necessity for use of force).

Within the bounds of both the UN Charter and customary practice, the inherent right of self defense has primarily found expression in three recurring areas: 1) protection of nationals and their property located abroad, 2) protection of a nation’s political independence, and 3) protection of a nation’s territorial integrity. Judge advocates must be familiar with these foundational issues, as well as basic concepts of self defense, as they relate to both overseas deployments and operations, such as the CJCS Standing ROE and the response to state-sponsored terrorism.

Protection of Nationals

Customarily, a State has been afforded the right to protect its citizens abroad if their lives are placed in jeopardy and a host State is either unable or unwilling to protect them. This right is cited as the justification for non-combatant evacuation operations, discussed in greater detail in Chapter 21 in this Handbook.

The protection of U.S. nationals was also cited as one of the legal bases justifying initial U.S. military intervention in both Grenada and Panama. In each case, however, the United States emphasized that protection of U.S. nationals, standing alone, did not necessarily provide the legal basis for the full range of U.S. activities undertaken in those countries. Thus, while intervention for the purpose of protecting nationals is both valid and an essential element in certain

uses of force, it cannot serve as an independent basis for continued U.S. military presence in another country after the mission of safeguarding U.S. nationals has been accomplished.

The right to use force to protect citizens abroad also extends to those situations in which a host State is an active participant in the activities posing a threat to another State's citizens (e.g., the government of Iran's participation in the hostage taking of U.S. embassy personnel in that country (1979-81); and Ugandan President Idi Amin's support of terrorists who kidnapped Israeli nationals and held them at the airport in Entebbe).

Protection of Political Independence

A State's political independence is a direct attribute of sovereignty and includes the right to select a particular form of government and its officers, to enter into treaties, and to maintain diplomatic relations with the world community. The rights of sovereignty or political independence also include the freedom to engage in trade and other economic activity. Consistent with the principles of the UN Charter and customary international law, each State has the duty to respect the political independence of every other State. Accordingly, force may be used to protect a State's political independence when it is threatened and all other avenues of peaceful redress have been exhausted.

Protection of Territorial Integrity

States possess an inherent right to protect their national borders, airspace, and territorial seas. No nation has the right to violate another nation's territorial integrity, and force may be used to preserve that integrity consistent with the customary right of self defense.

Collective Self Defense

To constitute a legitimate act of collective self defense, all conditions for the exercise of an individual State's right of self defense must be met - with the additional requirement that assistance is requested. There is *no* recognized right of a third-party State to intervene in internal conflicts where the issue in question is one of a group's right to self-determination and no request by the *de jure* government for assistance.

Collective Defense Treaties and Bilateral Military Assistance Agreements.

Collective defense treaties, such as the North Atlantic Treaty (NATO); the Inter-American Treaty of Reciprocal Assistance (the Rio Treaty); the Security Treaty Between Australia, New Zealand, and the United States (ANZUS); and other similar agreements do not provide an international legal basis for the use of U.S. force abroad, per se. These agreements simply establish a commitment among the parties to engage in "collective self defense," in specified situations, and the framework through which such measures are to be taken. From an international law perspective, a legal basis for engaging in measures involving the use of military force abroad must still be established from other sources of international law extrinsic to these collective defense treaties (i.e., collective self defense).

The United States has entered into bilateral military assistance agreements with numerous countries around the world. These are not defense agreements and thus impose no commitment on the part of the United States to come to the defense of the other signatory in any given situation. Moreover, such agreements, like collective defense treaties, also provide no intrinsic legal basis for the use of military force.

Anticipatory Self Defense Under Customary Law

As discussed above, many States embrace an interpretation of the UN Charter that extends beyond the black letter language of Article 51, embracing the customary law principle of "anticipatory self defense;" that is, justifying use of force to repel not just actual armed attacks, but also "imminent" armed attacks. Under this concept, a State was not required to absorb the "first hit" before it could resort to the use of force in self defense to repel an imminent attack.

Anticipatory self defense finds its roots in the 1842 *Caroline* case and a pronouncement by then-U.S. Secretary of State Daniel Webster that a State need not suffer an actual armed attack before taking defensive action, but may engage in anticipatory self defense if the circumstances leading to the use of force are "instantaneous, overwhelming, and leaving no

choice of means and no moment for deliberation.” As with any form of self defense, the principles of necessity and proportionality serve to bind the actions of the offended State.

Because the invocation of anticipatory self defense is fact-specific in nature, and therefore appears to lack defined standards of application, it remains controversial in the international community. Concerns over extension of anticipatory self defense as a pretext for reprisal or even preventive actions (i.e., use of force before the coalescence of an actual threat) have not been allayed by contemporary use. The United States in particular, in actions such as EL DORADO CANYON (the 1986 strike against Libya) and the 1998 missile attack against certain terrorist elements in Sudan and Afghanistan, has increasingly employed anticipatory self defense as the underlying rationale for use of force in response to actual or attempted acts of violence against U.S. citizens and interests.

It is important to note, however, that anticipatory self defense serves as a foundational element in the CJCS Standing ROE, as embodied in the concept of “hostile intent,” which makes it clear to commanders that they do not and should not have to absorb the first hit before their right and obligation to exercise self defense arises.

DOMESTIC LAW AND THE USE OF FORCE: THE WAR POWERS RESOLUTION

In every situation involving the possible use of U.S. force abroad, one of the first legal determinations to be made embraces application of Constitutional principles and the 1973 War Powers Resolution (WPR), Public Law 93-148, 50 U.S.C. §§ 1541-1548.

The Constitution divides the power to wage war between the Executive and Legislative branches of government. Under Article I, the power to declare war, to raise and support armies, to provide and maintain a navy, and to make all laws necessary and proper for carrying into execution the foregoing is held by the Congress. Balancing that legislative empowerment, Article II vests the executive power in the President and makes him the Commander-in-Chief of the armed forces. This ambiguous delegation of the war powers created an area in which two branches of government exercise concurrent authority over decisions relating to the use of armed forces overseas as an instrument of U.S. foreign policy.

Until 1973, a pattern of executive initiative, Congressional acquiescence, and judicial deference combined to give the President primacy in decisions to employ U.S. forces. In order to reverse the creeping expansion of Presidential authority and to reassert its status as a “full partner” in decisions relating to use of U.S. forces overseas, Congress passed, over presidential veto, the WPR. The stated purpose of the WPR is to ensure the “collective judgment” of both branches in order to commit to the deployment of U.S. forces by requiring consultation of and reports to Congress, in any of the following circumstances:

- (1) Introduction of troops into actual hostilities;
- (2) Introduction of troops, equipped for combat, into a foreign country; or
- (3) Greatly enlarging the number of troops equipped for combat, in a foreign country.

The President is required to make such reports within 48 hours of the triggering event, detailing the circumstances necessitating introduction or enlargement of troops, the Constitutional or legislative authority upon which he bases his action, and the estimated scope and duration of the deployment or combat action.

The issuance of such a report, or a demand by Congress for the President to issue such a report, triggers a sixty-day clock. If Congress does not declare war, specifically authorize the deployment / combat action, or authorize an extension of the WPR time limit. During that period, the President is required to terminate the triggering action and withdraw deployed forces. The President may extend the deployment for up to thirty days should he find circumstances so require, or for an indeterminate period if Congress has been unable to meet due to an attack upon the United States.

Because the War Powers Resolution was enacted over the President’s veto, one of the original purposes of the act—establishment of a consensual, inter-branch procedure for committing our forces overseas—was undercut: no President has conceded the constitutionality of the WPR or technically complied with its mandates. Although the applicability of the WPR to specific operations will not be made in the field, once U.S. forces are committed overseas, a deploying judge

advocate must be sensitive to the impact of the WPR on the scope of operations, particularly with respect to the time limitation placed upon deployment under independent Presidential action (i.e., the WPR's 60 day clock).

Procedures have been established which provide for CJCS review of all deployments that may implicate the WPR. The Chairman's Legal Advisor, upon reviewing a proposed force deployment, is required to provide to the DoD General Counsel his analysis of the WPR's application. If the DoD General Counsel makes a determination that the situation merits further inter-agency discussion, he or she will consult with both the State Department Legal Advisor and the Attorney General. As a result of these discussions, advice will then be provided to the President concerning the consultation and reporting requirements of the WPR.

In the unlikely event that a Judge Advocate or his supported commander is presented with a question regarding the applicability of the WPR, the appropriate response should be that the operation is being conducted at the direction of the National Command Authority and is therefore presumed to be in accordance with applicable domestic legal limitations and procedures.